

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Petition of MCImetro Access) WC Dkt. No. 02-283
Transmission Services LLC for Expedited)
Preemption)

**REPLY COMMENTS OF
MCIMETRO ACCESS TRANSMISSION SERVICES LLC**

MCImetro Access Transmission Services LLC (“MCImetro”) filed a petition (“Petition”) for expedited preemption on September 6, 2002, requesting that the Federal Communications Commission (“FCC” or “Commission”) expeditiously preempt the New York Public Service Commission (the “NY PSC”) and interpret certain provisions of the interconnection agreement (the “Agreement”) between MCImetro and New York Telephone Company d/b/a NYNEX (“Verizon”) executed on September 2, 1997, and approved by the NY PSC on October 1, 1997. Pursuant to the Commission’s September 18, 2002 Public Notice in the above-captioned docket and 47 C.F.R. § 51.803(a), both Verizon and the NY PSC have filed comments in response to MCImetro’s Petition. By its attorneys, MCImetro hereby submits its Reply Comments.

I. Introduction

As MCImetro explained in its Petition, it and Verizon have reached an impasse with respect to three issues under the Agreement:

- (1) Whether any provision of the Agreement allows Verizon unilaterally to withhold reciprocal compensation payments due pursuant to the Agreement and NY PSC orders.

- (2) Whether the Commission's *ISP Remand Order*¹ constitutes a change of law under paragraph 8.2 of the Agreement triggering the obligation to amend the Agreement.
- (3) If any amendment to the Agreement is required, what should be its effective date under paragraph 20.16 of the Agreement.²

As MCImetro further explained, the NY PSC has declined to interpret and enforce the interconnection agreement. Accordingly, as MCImetro demonstrated, the Commission should act expeditiously to preempt the NY PSC, pursuant to 47 U.S.C. § 252(e)(5) and the Commission's precedent in *Starpower I*,³ *Starpower II*,⁴ and *Cox Telcom*.⁵

While both Verizon and the NY PSC raise tangential issues in their comments, which MCImetro addresses below, neither disputes that the Commission should adjudicate this matter. Accordingly, the Commission should grant MCImetro's Petition for expedited preemption.

II. Argument

Neither Verizon nor the NY PSC disputes that the Commission should adjudicate this issue or that this matter is controlled by the Commission's precedent in *Starpower I*, *Starpower II*, and *Cox Telcom*. As the Commission determined in those cases, adjudication of disputes concerning the interpretation and enforcement of interconnection agreements is a

¹ *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 16 F.C.C.R. 9151 (2001) ("ISP Remand Order"), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

² Petition at 6, n. 18.

³ *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000).

⁴ *Starpower Communications, LLC v. Verizon South Inc.*, 17 F.C.C.R. 6873 (2002).

⁵ *Cox Virginia Telcom, Inc. v. Verizon South Inc.*, 17 F.C.C.R. 8540 (2002).

responsibility of the state commission under 47 U.S.C. § 252.⁶ While the NY PSC is correct that it does not *have* to adjudicate this dispute,⁷ if it chooses not to do so the Commission must step into its shoes.⁸ Further, while the NY PSC is correct that the Commission in *Starpower I* referred to other potential sources of authority for it to assert jurisdiction over this dispute,⁹ the Commission's precedent in *Starpower I*, *Starpower II*, and *Cox Telcom*, among others, is unequivocal that 47 U.S.C. § 252(e)(5) applies in these circumstances. Thus, no party disputes that the Commission should adjudicate this case. That is all the Commission need or should decide at this time.

Verizon, however, needlessly complicates these proceedings by requesting that the Commission not only preempt the NY PSC, but also issue a summary ruling against MCImetro on the merits. That request is absurd. MCImetro has not yet filed its pleading for relief on the merits. Pursuant to the Commission's rules, the first step in this matter is for the Commission to resolve MCImetro's Petition for preemption, not rule summarily on the merits. *See* 47 C.F.R. § 51.803. No rule permits the Commission to deny MCImetro's case on the merits before it is even filed. Consistent with the Commission's rules, MCImetro should be allowed to file its case, and this matter should proceed appropriately on the merits. *See id.*

In any event, Verizon's arguments on the merits are frivolous. For present purposes, and without any limitation to making a fuller set of arguments at the later and more appropriate stage, MCImetro briefly responds to Verizon as follows. Verizon contends that the

⁶ *Starpower I* ¶¶ 5-8; *Starpower II* ¶¶ 18-19; *Cox Telcom* ¶¶ 20-21, 27 n.85.

⁷ *See* Comments of the New York State Department of Public Services at 2.

⁸ *Starpower I* ¶¶ 5-8; *Starpower II* ¶¶ 18-19; *Cox Telcom* ¶¶ 20-21, 27 n.85.

⁹ *Starpower I* ¶ n.16.

Agreement does not require reciprocal compensation for calls to ISPs in the first place. But the NY PSC already has resolved that question against Verizon in prior decisions.¹⁰ That issue is not even part of MCImetro's case to be presented to the Commission. The Commission also lacks jurisdiction to preempt the NY PSC on issues it did resolve or to overrule the NY PSC's prior orders.

Moreover, Verizon's assertion that the Agreement here is indistinguishable from the two agreements in *Starpower II* that the Commission construed not to require reciprocal compensation for calls to ISPs is simply false. The Commission's determination that two agreements in *Starpower II* did not require reciprocal compensation for calls to ISPs hinged on express "end-to-end" language in those agreements. The Commission construed that language to link the reciprocal compensation obligations in those agreements to the Commission's interstate jurisdiction. *See Starpower II* ¶¶ 26-30, 32. Verizon does not, and cannot, contend that this Agreement includes such language, which materially distinguishes this Agreement from the two agreements in *Starpower II*.¹¹ Rather, the terms of this Agreement are far more closely aligned with the host of interconnection agreements that the courts, state commissions, and this Commission in *Starpower II* and *Cox Telcom* have concluded may be construed to require reciprocal compensation for calls to ISPs.¹² Like the Agreements in those cases, the Agreement

¹⁰ *See, e.g.*, Petition at 3.

¹¹ MCImetro respectfully contends that the Commission erred in its conclusion that two of the interconnection agreements in *Starpower* did not require reciprocal compensation for calls to ISPs.

¹² *See, e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Communications*, 235 F.3d 479, 499-501 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475 (5th Cir. 2000), *Illinois Bell Tel. Co. v. WorldCom Techs.*, 179 F.3d 566, 574 (7th Cir. 1999), *cert. dismissed sub nom. Mathias v. WorldCom Techs.*, 122 S. Ct. 1780 (2002); *Bell Atlantic-Md. v. MCI WorldCom*,

here requires reciprocal compensation for the transport and termination of local calls, which include calls to ISPs.

Nor has there been any change-of-law triggering the Agreement's amendment provisions, as Verizon contends.¹³ There has been no change of law because the *ISP Remand Order* did not "materially reduce or alter" any service required by the statute. WorldCom was required to terminate calls to ISPs originated by Verizon's customers before the *ISP Remand Order* issued. It is required to do so today. Nothing has changed. In addition, the parties expressly agreed that any amendment would be effective only when signed by the parties. None of the authorities Verizon cites allow the Commission to override this provision. Regardless, these disputes need not be decided here. Rather they should be decided at the proper time under the Commission's rules and procedures.

III. Conclusion

For the foregoing reasons and those set forth in its Petition, MCImetro respectfully requests that the Commission grant its Petition to preempt the NY PSC's jurisdiction

Inc., 240 F.3d 270, 296-97 (concluding that ISP-bound traffic is "local" under interconnection agreement does not conflict with federal law), *rev'd on other grounds sub nom. Verizon Md. v. Pub. Serv. Comm'n*, 122 S. Ct. 1753 (2002); *Verizon Cal., Inc. v. California Telecomms. Coalition*, Nos. C 99-03973, et al., slip op. at 19 (N.D. Cal. Sept. 27, 2001); *BellSouth Telecomms. v. ITC DeltaCom Communications*, 62 F. Supp. 2d 1302, 1310-15 (M.D. Ala. 1999); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan*, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093, at *16 (W.D. Mich. Aug. 2, 1999); *Cox Telcom*, 17 F.C.C.R. 8540. Approximately thirty-one state utility commissions have reached the same conclusions.

and immediately institute a proceeding to interpret and enforce the parties' interconnection agreement.

Respectfully submitted,

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¹³ Comments of Verizon at 4, 5.